

A. Special Access Rates Are Falling.

In response to the *NPRM*, Qwest and other commenters demonstrated compellingly that overall special access revenues have risen as a function of increased demand for special access services.¹⁴³ Special access revenues per unit, however, have been static or declining.¹⁴⁴ In other words, incumbent LECs are generating more special access revenues only because the high-capacity transmission market is growing – even though per-unit special access prices are falling.

More recent data reveal the same trend to have continued. A report released several weeks ago by Frost and Sullivan states that average annual price decreases of 30 percent for wholesale private-line services were “not uncommon in the last few years,” and predicts that the market is now “witnessing price declines on the order of 10-20 percent per year.”¹⁴⁵ The GAO report cited in the *Public Notice*¹⁴⁶ shows that prices for both DS1 and DS3 channel terminations declined by about 20 percent from the time pricing flexibility was implemented until 2005. GAO’s data show that the average price for DS1 channel terminations in 56 studied MSAs declined from \$161.62 prior to the implementation of pricing flexibility to \$128.88 in 2005.¹⁴⁷

¹⁴³ See, e.g., Comments of Qwest Communications International Inc., WC Docket No. 05-25 at 4, Att. A at 2 (filed June 13, 2005); Reply Comments of Verizon Communications Inc., WC Docket No. 05-25 at 5, 12 (filed July 29, 2005); Reply Comments of SBC Communications, WC Docket No. 05-25 at 26-31 (filed July 29, 2005).

¹⁴⁴ *Id.*

¹⁴⁵ *North American Wholesale Private Line Services*, Frost & Sullivan, N0DF-63 (2007) (“*Frost & Sullivan*”) at 1-19.

¹⁴⁶ *Public Notice* at 2 n.7.

¹⁴⁷ Government Accountability Office, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO 07-80 (Nov. 2006) at 65 (App. 2, Table 9) (“*GAO Report*”). This table most accurately demonstrates the decline in prices because it uses the most accurate inflation index and avoids GAO’s weighting methodology, which the office acknowledges is decidedly “imperfect.” *Id.* at 59.

The average price for DS3 channel terminations fell from \$1,475.83 before pricing flexibility to \$1,194.97 in 2005.¹⁴⁸

The specific data for Qwest's region show generally similar trends. Overall, Qwest's total revenue per unit of capacity for special access services has fallen dramatically since pricing flexibility was implemented. Taking account of Qwest's revenues for interstate private line circuits at all capacities, Qwest's revenue per DS0 equivalent capacity in 2006 was only [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of what it had been in 2001.¹⁴⁹

For channel terminations plus mileage at the DS1 level, Qwest's average revenue per channel termination across its five largest MSAs (Denver-Boulder, Minneapolis-St. Paul, Phoenix-Mesa, Portland-Vancouver, and Seattle-Bellevue-Tacoma) fell by [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] percent between 2001 and 2006. The sharpest drops were in Denver-Boulder, where the revenue per termination fell by [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] percent, and Portland-Vancouver, where revenue fell by [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] percent. For channel terminations at the DS3 level, Qwest's average revenue per channel termination for the same five MSAs fell by [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] percent between 2001 and 2006. The biggest drops were in Denver-Boulder, where revenue fell by [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] percent per channel termination,

¹⁴⁸ *Id.* at 65.

¹⁴⁹ See Cogan Decl. at ¶ 16.

and Seattle-Bellevue-Tacoma, where it fell by [BEGIN CONFIDENTIAL] ■ [END CONFIDENTIAL] percent per channel termination.¹⁵⁰

Finally, any comparison of pre-flexibility rates to post-flexibility rates – or of rates in pricing flexibility MSAs to rates outside such MSAs – must account for the fact that there is no reason to believe that price-capped rates provide a proper point for comparison. As the Commission expressly acknowledged in the *Pricing Flexibility Order*, the price cap regime may well result in rates well below those that would prevail in a competitive market, which would tend to stifle competition and investment. In adopting the pricing flexibility regime, the Commission “recognize[d] that the regulatory relief we grant upon a Phase II showing may enable incumbent LECs to increase access rates for some customers,” but found that relief “nonetheless is warranted” because, among other reasons, “our rules may have required incumbent LECs to price access services below cost in certain areas.”¹⁵¹ Price differences between price-cap jurisdictions (past or present) and price-flex jurisdictions are irrelevant absent a showing of why the former prices are somehow more valid than those produced through the operation of today’s briskly competitive market.

B. Criticisms of Current Special Access Rate Levels Are Specious.

Throughout this proceeding, various parties have presented information or theories purporting to show that special access prices, or incumbent LEC special access profits, are excessive. As demonstrated here, none of these data or theories is valid.

¹⁵⁰ See Cogan Decl. at ¶ 17.

¹⁵¹ *Pricing Flexibility Order*, 14 FCC Rcd at 14301 ¶ 155.

1. Generally Available Tariffed Rates in Pricing Flexibility Areas are Irrelevant.

Any analysis of incumbent LEC special access prices must focus on the prices customers are actually paying. As demonstrated above, those prices are trending downward.¹⁵² Most analyses of special access prices purporting to show high rates or profits begin from a fundamentally flawed point of departure – incumbent LECs’ generally available tariffed rates in pricing flexibility areas.¹⁵³ These prices are of very limited utility to the present inquiry because the vast majority of customers receive discounts off of the list price, just as the *Pricing Flexibility Order* intended. These customers purchase services pursuant to discount plans or contract tariffs that include substantial discounts off of the generally available rates and account for customers’ specific needs. Even customers relying on tariffs can and do make use of (generally available) term discount plans. The remainder of special access service is provided pursuant to volume and/or term discounts.

Qwest provides most of its special access services in pricing flexibility areas pursuant to various discount pricing plans (including plans available through tariffs and contract tariffs). Customers representing [BEGIN CONFIDENTIAL] ■ [END CONFIDENTIAL] percent of Qwest’s special access revenues in pricing flexibility areas purchase special access services either pursuant to term and volume discount plans, or pursuant to contract tariffs that may differ substantially from the monthly rates of any standard filed tariff.¹⁵⁴

¹⁵² See *supra* Section III.A.

¹⁵³ See, e.g., *GAO Report* at 27-29 (analyzing list price trends).

¹⁵⁴ See Cogan Decl. at ¶ 21.

Qwest's primary discount plan, the Regional Commitment Plan ("RCP"), provides for meaningful discounts off of standard tariffed monthly rates for DS1 and DS3 customers that agree to a forty-eight month term and a volume commitment of 90 percent of the customer's circuit volume level at the time of purchase.¹⁵⁵ A significant number of special access customers – especially those purchasing higher-capacity optical services – purchase Qwest's special access services pursuant to individualized contract tariffs. These contracts typically provide even steeper discounts than the volume and term discount plans, as the negotiations usually begin from discount plan prices and result in even more generous rate reductions and terms. For example, Qwest's contract tariffs can provide for discounts of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] percent off of month-to-month tariffed rates, with most contract tariffs providing discounts in of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] off of those rates.¹⁵⁶

These discount plans generally require customers to make certain commitments in terms of time, volume, or both, but such provisions are standard parts of discount plans in competitive markets and necessary for the reasonable recovery of Qwest's investments.¹⁵⁷ The D.C. Circuit recently affirmed the reasonableness of volume and term discounts to recover incumbent LECs' investments in providing special access services,¹⁵⁸ noting that it would be difficult to justify regulation that "frustrat[es] Bell Operating Companies' attempts to maintain stable utilization

¹⁵⁵ See Cogan Decl. at ¶ 19.

¹⁵⁶ See *id.* at ¶ 20.

¹⁵⁷ See *supra* note 49 and associated text.

¹⁵⁸ *BellSouth Telecommunications v. FCC*, 469 F.3d 1052 (D.C. Cir. 2006).

rates on their networks or to lower their prices” in the special access context.¹⁵⁹ Even the *GAO Report* ultimately admits that the Office’s “analysis confirmed that many contracts with major incumbent carriers provide discounts that, along with *CALLS Order* decreases to the price-cap list price, can eliminate any increases in price-flex list price that may have occurred as a result of phase II pricing flexibility.”¹⁶⁰

The pricing flexibility rules permit incumbent LECs to enter into individualized arrangements with special access customers, and the Commission should be pleased that they have done so. The generally available tariff prices are not a meaningful basis on which to analyze special access prices.

2. ARMIS Data Do Not Accurately Reflect Special Access Rates of Return.

As Qwest and other commenters pointed out in 2005, ARMIS data remain an ineffective basis for estimating the reasonableness of special access prices or incumbent LEC rates of return for providing special access services, and in any event are irrelevant to incumbent LECs’ special access pricing decisions.¹⁶¹ It has long been accepted that an accounting rate of return – such as that derived from the ARMIS data – is a grossly inaccurate means of determining market power

¹⁵⁹ *Id.* at 1056.

¹⁶⁰ *GAO Report* at 30.

¹⁶¹ See, e.g., Reply Comments of Qwest Communications International Inc., WC Docket No. 05-25 (filed July 29, 2005) at 6-9; Reply Comments of Verizon Communications Inc., WC Docket No. 05-25 (filed July 29, 2005) at 8-12; Reply Comments of SBC Communications, WC Docket No. 05-25 (filed July 29, 2005) at 36-43.

or actual economic profits.¹⁶² Certainly, Qwest does not use ARMIS data in its business decisions related to special access investment or pricing.

There is a sharp and distinct difference between the categorized “costs” reported through a rate-of-return report such as ARMIS and the product-related costs actually contributing to a carrier’s profits. Rate-of-return reports, which are based on regulatory cost assignments that are fundamentally artificial (such as those currently depicted in ARMIS reports), are not an accurate reflection of a carrier’s true economic profits – particularly when applied to individual services.¹⁶³ When a regulator such as the Commission allocates a carrier’s costs for accounting purposes between regulated and non-regulated services categories, and then further allocates these costs between interstate and intrastate jurisdictions, the resulting data do not reflect a carrier’s actual costs, profits or losses for an individual service or category of services such as special access.¹⁶⁴ Many network costs simply cannot be directly assigned to particular services. As a result, any allocations of such common costs can be, and often are, inherently arbitrary.¹⁶⁵ Thus, such data do not provide regulators with an accurate basis for making pricing decisions.¹⁶⁶

It is also clear that the Commission’s jurisdictional separations freeze has caused serious distortions in the data generated by the ARMIS reports – and that this renders ARMIS data even

¹⁶² See, e.g., Almarin Phillips, *Market Concentration and Performance: A Review of the Evidence*, 61 NOTRE DAME L. REV. 1099, 1102-03 (1986), citing F. Fisher and J. McGowan, *On the Misuse of Account Rates of Return to Infer Monopoly Profits*, 73 AMER. ECON. REV. 82 (1983).

¹⁶³ See Declaration of Alfred E. Kahn and William E. Taylor on Behalf of BellSouth Corporation, Qwest Corporation, SBC Communications, Inc., and Verizon, attached to Opposition of Qwest Communications International Inc., RM-10593 (filed Dec. 2, 2002) (“Kahn and Taylor Declaration”) at 7-8.

¹⁶⁴ See *id.* at 8.

¹⁶⁵ See *id.* at 7-12.

¹⁶⁶ *Id.*

less suitable as a basis for analyzing a carrier's actual costs and profits. Service-specific cost data in ARMIS are limited by the Part 36 Jurisdictional Separations rules, which (1) require carriers to divide investment artificially into arbitrary categories and (2) allocate that investment between the interstate and intrastate jurisdictions. The most serious problems are caused by the succession of freezes in the separations factors, culminating with the freeze that accompanied the passage of the CALLs plan in 2001. The Part 36 Rules thus have resulted in arbitrary cost allocations that bear little or no relationship to cost causation. Estimating the rate of return for special access services using a "cost" proxy that bears little relationship to the actual costs of providing special access services produces meaningless results. Serious policy problems exist as well. To use ARMIS data to examine rates of return for specific incumbent LEC service categories would require a re-examination of the numerous policy judgments about cost allocations to determine how well they have tracked the decades of fundamental changes to telecommunications technology and shifts in demand. The separations freeze in effect since 2001 has not allowed the allocation process to keep pace with the accelerating changes in technology and customer demand that have occurred since that time.¹⁶⁷

As Qwest has shown, the inaccuracies that result from these anomalies are so pervasive that the ARMIS data do not even demonstrate meaningful trends.¹⁶⁸ Moreover, Qwest reports ARMIS data in a manner that is entirely consistent with the ARMIS reporting rules. Those rules

¹⁶⁷ To the extent that arbitrary presumptions about cost allocation artificially inflate the apparent rate of return for Qwest's special access service, those presumptions also artificially deflate the apparent rate of return for other services – notably, interstate switched access services. Any effort to "remedy" the erroneous special access figure by reducing rates without "remedying" the switched access figure by permitting higher rates for those services would be arbitrary and capricious.

¹⁶⁸ Reply Comments of Qwest Communications International Inc., WC Docket No. 05-25 at 6-9 (filed July 29, 2005).

simply were not devised with an eye to developing meaningful service-specific revenue or rate of return figures. This regulatory limitation is no one's fault, and cannot be visited on carriers complying with the ARMIS reporting rules.¹⁶⁹

V. GIVEN THE ABOVE, THE COMMISSION SHOULD RETAIN THE OVERALL PRICING FLEXIBILITY REGIME, AND SHOULD GRANT NEW PRICING FLEXIBILITY IN CERTAIN PRODUCT MARKETS.

Given everything that has occurred in the marketplace since the *Pricing Flexibility Order*, there is no factual or legal basis for backing away from the market-based initiatives in that order. Competition in the high-capacity transmission market is remarkably strong, with wireline and intermodal providers fighting fiercely for available revenues. Whether or not predictive judgment about the prospect for competition was required in 1999, such competition has in fact developed – and with a vengeance. As one would expect in a competitive market, pricing flexibility has led to declining overall price levels, as reflected in average revenues per line. These developments confirm the validity of the Commission's policy judgments in the *Pricing Flexibility Order*, and demonstrate that the product market and competitive triggers established in that order were, if anything, too narrow. Moreover, the evidence presented above shows unequivocally that technological and economic changes are afoot, likely guaranteeing that the coming years will see the advent of more and more robust competition, with services provisioned over more and more diverse platforms.

The Commission should therefore reject calls for a re-imposition of price cap regulation. Rather, given the rapidly evolving state of competition in the high-capacity transmission market,

¹⁶⁹ See, e.g., Reply Comments of T-Mobile USF, Inc., WC Docket No. 05-25 at 8 (filed July 29, 2005) (“[A]ny cost misallocations [in ARMIS data] are largely attributable to the ILECs’ own reporting actions.”).

it should move immediately to (1) refine the product market definitions employed in the *Pricing Flexibility Order*, (2) grant Phase II relief with regard to all OCn-capacity services and packet-switched offerings of similar speed, and (3) grant Phase I relief with regard to all services in all markets to facilitate the benefits of flexible negotiations against the backdrop of generally available tariffed rates.

A. The Commission Should Reject Calls for Re-Imposition of Price-Cap Regulation.

The past eight years have validated the sound policies adopted in the *Pricing Flexibility Order*. Special access customers have enjoyed the benefits of that flexibility, with price cap LECs entering into numerous customized offerings specifically tailored to the needs of individual special access customers. In Phase II pricing flexibility markets, special access rates have been set by competition, rather than regulation, as the Commission intended. This has allowed market rates to prevail, reducing or eliminating the inefficiencies that inevitably result from regulated prices.¹⁷⁰

Nothing has occurred over the past eight years that should cause the Commission to rethink the framework it established in the *Pricing Flexibility Order*. The high-capacity transmission market continues to be ideally suited for competitive entry, given high demand and the point-to-point nature of these services. Indeed, competition for high-capacity transmission service has expanded substantially since the *Pricing Flexibility Order*, in both large and relatively small MSAs. Increases in the price cap LECs' special access revenues have resulted primarily from steadily increasing demand for these services. Given the amount of fiber deployment that has occurred, and continues to occur, as well as the intermodal competition that

¹⁷⁰ See *supra* Part I.D.

has arisen and continues to grow, there is no reason to believe that supra-competitive rates by the price cap LECs would be sustainable.

Thus, except as described below, the Commission should retain the specific collocation triggers it adopted in the *Pricing Flexibility Order*. As the Commission recognized in that order, the selection of triggers for pricing flexibility is not “an exact science.”¹⁷¹ The current triggers, however, reasonably reflect levels of investment by competitors that are sufficient to discipline the price cap LEC’s special access rates in an MSA. To qualify for Phase II relief for dedicated transport and special access services, price cap LECs must demonstrate that unaffiliated competitors have (1) fiber-based collocations in at least 50 percent of the LEC’s wire centers within an MSA or (2) fiber-based collocations in wire centers accounting for 65 percent of the LEC’s revenues from these services within an MSA.¹⁷² For channel terminations between a LEC end office and an end-user customer, price cap LECs must demonstrate that unaffiliated competitors have (1) fiber-based collocation arrangements in 65 percent of the LEC’s wire centers within an MSA or (2) fiber-based collocation in wire centers accounting for 85 percent of the price cap LEC’s revenues from the service within the MSA before winning Phase II pricing flexibility.

Markets in which the incumbent has achieved Phase II pricing flexibility by definition enjoy substantial sunk competitive investment. As such, it is appropriate to permit market forces to govern the rates for special access in those markets. Satisfaction of the Phase II triggers ensures that competitors have established a significant market presence (*i.e.*, that competition for services within the MSA is sufficient to preclude the incumbent from exercising market power

¹⁷¹ *Pricing Flexibility Order*, 14 FCC Rcd 14276 ¶ 96.

¹⁷² *Id.* at 14299 ¶¶ 148-49.

over a sustained period).¹⁷³ An incumbent's satisfaction of the Phase II triggers also constitutes strong evidence that competitive LECs have a competitive alternative for dedicated transport services needed to reach the majority of their customers throughout the MSA.¹⁷⁴ In fact, as the D.C. Circuit and the Commission have recognized, reliance on fiber-based collocation likely "underestimates competition in relevant markets," – particularly intermodal competition – "as 'it fails to account for the presence of competitors that ... have wholly bypassed incumbent LEC facilities.'"¹⁷⁵ In those circumstances, pricing flexibility cannot and will not engender the harms feared by opponents of the pricing flexibility regime.

The case for relying on market forces rather than regulation in markets evidencing substantial fixed competitive investment is particularly strong in relation to the high-capacity transmission market. As the Commission has recognized, special access services are purchased primarily by "sophisticated purchasers of telecommunications services, fully capable of finding competitive alternatives when they exist and determining which competitor can best meet their needs."¹⁷⁶ Qwest has experienced this sophistication first-hand in its dealings with its special access customers since it received pricing flexibility. Those customers have made it clear through negotiations that they have alternatives to Qwest's special access services in many cases, and that they are utilizing those alternatives. Qwest has lost retail contracts with large business clients including [BEGIN CONFIDENTIAL] [REDACTED]¹⁷⁷ [END

¹⁷³ *Id.* at 14296 ¶ 141.

¹⁷⁴ *Id.* at 14296-97 ¶ 142.

¹⁷⁵ See *WorldCom, Inc. v. FCC*, 238 F.3d 449, 462 (D.C. Cir. 2001) (quoting *Pricing Flexibility Order*, 14 FCC Rcd at 14265-66 ¶ 81). See also *TRRO*, 20 FCC Rcd 2589 ¶ 95 (quoting same).

¹⁷⁶ *Pricing Flexibility Order*, 14 FCC Rcd 14302 ¶ 155.

¹⁷⁷ See Cogan Decl. at ¶¶ 11-13.

CONFIDENTIAL] In Phoenix, Cox is competing with Qwest for wireless wholesale contracts, [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL].¹⁷⁸ In Nebraska, Qwest [BEGIN CONFIDENTIAL] [REDACTED] [REDACTED] [END CONFIDENTIAL].¹⁷⁹

In both Nebraska and Minnesota, the power utility is selling capacity on fiber that is otherwise used to manage the power grid.¹⁸⁰ In South Dakota, Qwest has lost [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] business to South Dakota Networks.¹⁸¹ These losses demonstrate that competitive forces are policing the market, just as the Commission hoped that they would. This is not the time for pervasive re-regulation.

In light of these market realities, any retreat from the pro-competitive policies adopted in the *Pricing Flexibility Order* would have a significant adverse impact on the telecommunications industry. Both incumbents and competitors have developed business plans based on the expectation that the Commission would maintain the approach it adopted in the *Pricing Flexibility Order*, building on the Commission's market-based approaches to special access pricing. Any substantial deviation from this approach – particularly the re-imposition of price cap regulation in Phase II MSAs – would upset those expectations and most likely stifle facilities deployment. As described above, mandated below-market prices would deter innovation and investment by incumbents and competitors alike.

¹⁷⁸ See Cogan Decl. at ¶ 5.

¹⁷⁹ See *id.* at ¶ 8.

¹⁸⁰ See *id.* at ¶ 7.

¹⁸¹ See *id.* at ¶ 9.

B. The Commission Should Modify Certain Aspects of the Regime to Reflect Increasing Competition.

While the Commission should maintain the general pricing flexibility framework, the discussion above demonstrates a need for certain modifications. First, the Commission should modify its definition of the relevant product markets to account specifically for the sorts of competition discussed herein. Second, in light of its findings in the *TRO*, it should confer Phase II relief with regard to all OCn-capacity facilities. Third, given the benefits of open negotiation and the tariff protections that remain in place under Phase I relief, the Commission should grant that level of relief to all special access services nationwide.

1. The Commission Should Modify the Product Markets Defined in the *Pricing Flexibility Order*.

In the *Pricing Flexibility Order*, the Commission identified three essential product markets for special access services: (1) special access channel terminations between a LEC's end office and customer premises, (2) special access channel terminations between an IXC point of presence ("POP") and a LEC service wire center, and (3) other special access facilities.¹⁸² The Commission should retain these product markets with three modifications.

First, the Commission should clarify that the second category (*i.e.*, channel terminations to a POP) includes channel terminations to *any* carrier's POP, rather than only the POPs of IXCs. As the Commission recognized in the *TRRO* and as described above, connections between carriers' networks are ripe for competitive deployment, principally because they involve substantial aggregation of traffic and because competitors enjoy a degree of discretion over where they place their points of network interconnection. For these reasons, "entrance facilities"

¹⁸² See *NPRM* ¶ 81.

of all types display economic characteristics that render them alike as a class, but differentiate them from inter-office transport links. The Commission should recognize as much.

Second, the Commission should expand the definition of each product market to include all substitutes for incumbent LECs' special access services. As described above, the Commission, the Courts, the DOJ and the FTC all recognize that a product market must be understood to include not only a specific offering but also substitutes for that offering – i.e., products that customers can and will use in lieu of the product at issue. Traditional special access services face substantial and fast-growing competition from emerging substitutes, including Ethernet-based services, wireless services, cable, and other nascent offerings. These alternatives must inform any consideration of high-capacity transmission market conditions. Thus, the Commission must recognize that, to the extent the term “special access” refers only to incumbent LEC offerings – or even to wireline offerings more broadly – there is no such thing as a “special access market.” Rather, the markets at issue here are those for high-capacity point-to-point transmission, whether provided over copper links, fiber-optic facilities, coaxial cable, wireless spectrum, or yet another platform.

Third, the Commission should define a separate product market for OCn-capacity services. As described above, the Commission has determined that these links are suitable for competitive deployment in all geographic markets. As such, they display economic characteristics that differentiate them from other transmission services, and should be treated distinctly.¹⁸³

¹⁸³ As the Commission has noted, providers typically install fiber-optic facilities capable of being lit at very high capacities, and then channelize these facilities to provide service at DS1- or DS3-capacity. *See, e.g., TRRO*, 20 FCC Rcd at 2618 ¶ 154 (noting that “the incremental costs of providing channelized capacity over a higher-capacity fiber loops are minimal when one or more other customers in a building (continued on next page)

2. The Commission Should Accord Phase II Pricing Flexibility With Regard to All OCn-Capacity Services.

In a separate docket, Qwest is seeking forbearance from all Title II and Computer Inquiry obligations with respect to (1) packet-switched services capable of providing speeds of 200Kbps in each direction, and (2) non-TDM optical networking, optical hubbing, and optical transmission services.¹⁸⁴ If granted, such forbearance would, among other things, eliminate price regulation of Qwest's OCn-capacity services. Qwest urges the Commission to act expeditiously on Qwest's forbearance petition in that docket.

Qwest also believes, however, that the evidence in this docket justifies the elimination of price cap regulation for all OCn special access services and packet switched services of comparable speed, such as Frame Relay and Asynchronous Transfer Mode (“ATM”) service.¹⁸⁵ As described above, the Commission has expressly found that OCn services are available to competitors from sources other than the incumbent LEC.¹⁸⁶ Likewise, the Commission has repeatedly stated that “any collocation costs and delays incurred by requesting carriers to provide packet switched services do not rise to a level so as to require us to modify the Commission’s previous finding not to unbundle packet switching.”¹⁸⁷ Under these circumstances, there can be no argument that incumbents exercise market power with respect to OCn and packet-switched

are already served by competitive fiber of sufficient capacity”); *id.* at 2626 ¶ 150. Thus, even a framework that granted Phase II relief with respect to all OCn-capacity services would not fully account for the feasibility of deploying OCn-capacity facilities, because it would still fail to reflect the second-order effect that OCn deployment has on the availability of DS1- and DS3-capacity circuits.

¹⁸⁴ See *supra* note 2.

¹⁸⁵ As noted, however, nothing in these comments modifies or supersedes the relief Qwest seeks in the forbearance proceeding. See *supra* note 2.

¹⁸⁶ *TRO*, 18 FCC Rcd at 17168 ¶ 315.

¹⁸⁷ *Id.* at 17322-33 ¶ 539; see also *TRRO*, 20 FCC Rcd at 2658-59 ¶ 224.

services. As the Commission has found, the economics for larger capacity services, such as OCn level and above, are such that it is economically feasible for competitors to build their own facilities to provide these services. There is no need for regulatory intervention with regard to OCn level services, since there is no question about competitors' willingness or ability to supply this level of service.¹⁸⁸ Under these conditions, there can be no justification for price cap regulation to constrain the prices of these services when offered by an incumbent LEC. Accordingly, the Commission should afford price cap incumbent LECs Phase II pricing flexibility for these services nationwide.

3. The Commission Should Accord Phase I Pricing Flexibility With Regard to All Services.

Moreover, the Commission should make Phase I pricing flexibility available in all MSAs for all special access services, without the triggers that currently are used to determine when this relief is warranted. Phase I relief permits the incumbent to enter into negotiated agreements meeting specific customers' needs, but does not permit the incumbent to detariff its special access offerings. Moreover, because the services at issue will continue to be available pursuant to tariff, the rates and terms under which they are sold will remain subject to the protections afforded by sections 201 and 202 of the Act.¹⁸⁹ In light of these various safeguards, and the extensive competition described above, the benefits of Phase I flexibility far outweigh the purported costs.

Granting Phase I pricing flexibility in all MSAs for all special access services would give incumbent LECs the ability and incentive to develop appropriate term and volume discounts and

¹⁸⁸ As noted above, the TRO's determination that competitors did not require unbundled access to OCn-capacity facilities was not challenged. *See supra* note 25.

¹⁸⁹ 47 U.S.C. §§ 201, 202.

contract tariffs for special access services region-wide, which will establish a framework for competition in these services and stimulate the entry of competitors.¹⁹⁰ As the Commission has previously held, private negotiations permit parties to develop arrangements “that may better accommodate their individual market circumstances,” and “to modify their arrangement over time as their respective needs and requirements change.”¹⁹¹ Such negotiations also prompt providers to differentiate themselves from their competitors by pursuing innovative offerings and business arrangements.¹⁹² The result is to enhance the welfare of buyers and sellers alike. Indeed, Qwest seeks to enjoy the advantages of Phase I flexibility not only as a provider of special access services in its region, but also as a *consumer* of other carriers’ special access services outside of that region.

CONCLUSION

For the reasons described above, the Commission should reject calls for the re-imposition of price cap regulation of special access services. Recent years have seen an explosion of deployment by incumbents and competitors alike. Moreover, rapidly expanding backhaul needs are prompting a shift to higher-capacity next-generation networks even more susceptible than current networks to competitive replication. Accordingly, the high-capacity transmission market reveals no evidence of supracompetitive prices or profits. Indeed, under the market circumstances described herein, incumbent providers are and will remain unable to sustain

¹⁹⁰ See, e.g., Cogan Decl. at ¶ 2.

¹⁹¹ *Wireline Broadband Order*, 20 FCC Rcd at 14900 ¶ 88.

¹⁹² See *id.* See also *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd. 13494, 13501-02 ¶¶ 12-13 (2004) (explaining that Commission’s “pick and choose” rule governing interconnection agreements had resulted in “largely standardized agreements with little creative bargaining to meet the needs of both [parties],” and deterred parties “from testing and implementing mutually beneficial innovative business arrangements”).

above-market prices. Furthermore, the wireless providers that have prompted the instant inquiry have by any measure experienced remarkable growth notwithstanding purportedly prohibitive special access rates. Given the above, the Commission should retain the basic pricing flexibility regime, but afford immediate Phase I relief in all markets and Phase II relief with respect to all OCn-capacity and packet-switched services.

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August 8, 2007

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Special Access Rates for) WC Docket No. 05-25
Price Cap Local Exchange Carriers)

DECLARATION OF THOMAS COGAN

1. My name is Thomas Cogan. I am employed by Qwest Services Corporation¹ ("QSC") as Manager, Product Management. My business address is 1801 California, 22nd Floor, Denver, CO, 80230. I have been employed by Qwest and its predecessor companies, (Northwestern Bell and U S West) for over 22 years. My current responsibilities include leading a team that manages local Special Access services including DS1, DS3, SONET, DWDM and Ethernet.
2. The purpose of this declaration is to describe the competition that Qwest Corporation ("Qwest") faces in the Special Access market. In the course of my duties I learn from customers that they have alternative providers, including intermodal providers. Further, I hear from the wholesale sales channel when we have an opportunity where we need to compete with those other providers and thus must special pricing, or when we lose an opportunity, generally because of pricing. I am part of the team that establishes

¹ Qwest Services Corporation is a subsidiary of Qwest Communications International Inc. that performs support functions, such as business management, for other Qwest entities.

pricing guidelines for special pricing contract tariffs and am consulted prior to implementing discounts that fall outside the guidelines that my team and I have established. Additionally, I assist with developing the discount plans for, and have participated in customer negotiations with, very large customers. In the course of my duties I have learned from customers that they would like Qwest to be able to negotiate lower prices ubiquitously, not just in areas where Qwest has phase I or phase II pricing flexibility.

Details About Competition on the Ground

3. In the course of my duties I learn from customers that they have alternative providers, including intermodal providers. As detailed below, we are facing significant competition.
4. High speed internet access is a substitute for special access, especially DS1s. Qwest and its competitors are currently providing xDSL offerings broadly within Qwest's territory, over DS0 loop facilities that are deployed to over 80 percent of the customers in Qwest's region and available as UNEs in almost every one of Qwest's 1,200 or so wire centers
5. In Phoenix Qwest competes against Cox for fiber-based DS3s and ring systems at cell site locations. Cox has been successful in targeting cell sites in this market. Cox has competed for, and in some cases won business from [BEGIN CONFIDENTIAL]
[REDACTED] [END CONFIDENTIAL].
6. In both Denver and Salt Lake City, Verizon Wireless will give Verizon Business (Verizon's CLEC arm) the first right of refusal on Special Access opportunities, thus

bypassing Qwest. They may go to Verizon Business directly without giving Qwest the chance to bid at all.

7. In Nebraska and Minnesota, the power company is laying fiber to manage power grids. Any excess is sold off or an incremental build is completed to provide telecommunications service.

8. In Nebraska, Qwest lost the opportunity to provide [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] with fiber-based DS1s to cell sites. US Cellular and the power company appear to have won this opportunity. NIPCO has a particular competitive advantage over Qwest because it has coverage outside of Qwest's ILEC territory, while Qwest does not. [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] sought coverage in areas that are both inside and outside of Qwest's ILEC territory. Qwest also lost business in Nebraska to Windstream, which bought collocation from Qwest and sold ring systems to [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL].

9. In South Dakota Qwest lost [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] business to South Dakota Networks. This is an instance where the lack of Pricing Flexibility hurt Qwest. [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] wanted Qwest to be able to negotiate a rate below the price cap rate. Qwest was unable to do so because it does not have pricing flexibility in South Dakota and rural Nebraska.

10. AT&T/TCG and Level3/ICG have been competitors for [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] business in various markets.
11. In 2005, Qwest competed in an aggressive bidding forum against AT&T and MCI for a [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] network in Minneapolis.
12. Qwest lost a network renewal contract for [BEGIN CONFIDENTIAL] [REDACTED] [REDACTED] [END CONFIDENTIAL] to AT&T in Phoenix.
13. Qwest lost a [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] network opportunity to AT&T in the Seattle area.
14. Even customers that are staying with Qwest for now, tell us that they have other options, and that they expect to use those options in the future. For example, recently a customer that has bought a ring from Qwest added a node to the ring. The customer put the node out to bid to other suppliers as well, and appears to have discovered that it could buy the whole ring from another vendor for less than Qwest charges. Accordingly, the customer added the node for a limited term, timed to expire at the same time as the rest of the ring. This customer let us know that it would likely not renew the whole ring from us at the end of the term at the current price point.
15. As listed in the table below, Qwest has had a significant number of losses in the Northwestern portion of its territory (Idaho, Washington, Montana, and Oregon) to competitors providing attractively priced Ethernet solutions.

REDACTED – FOR PUBLIC INSPECTION

[BEGIN CONFIDENTIAL]

[END CONFIDENTIAL]